BRIEF OF THE ASSOCIATION OF UNIVERSITIES AND COLLEGES OF CANADA TO THE SUB-COMMITTEE ON EQUALITY RIGHTS

The Association of Universities and Colleges of Canada (AUCC) is a national association of degree-granting institutions. Its membership numbers 73 universities and university-level colleges, each member institution being represented by its president, rector or principal, as the case may be.

Introduction

The coming into force on 17 April 1985 of Section 15 of the Canadian Charter of Rights and Freedoms will have a major impact on Canadian society. Some of the issues arising from the entrenchment of equality rights in the basic constitutional laws of this country are raised in the discussion paper of the Minister of Justice entitled "Equality Issues in Federal Law". Some of these issues have been referred to your sub-committee for further study. Other issues have not yet been identified and will surface in the future as Canadian society comes to know and adjusts to the precise implications of equality rights.

Most of the issues identified to date have an impact on the university community although the magnitude of that impact cannot yet be assessed. The development of a legal and administrative jurisprudence will, in time, allow our universities to determine with precision the effect of equality rights upon their objectives, operating structures and resources.

This brief addresses the issue of mandatory retirement only. Time factors and the uncertainty surrounding the subject of equality rights, when reduced to practical application, prevent the AUCC from preparing a comprehensive submission on the larger subject. The general principle of equality before the law is a laudable objective. Translated into application, however, it may be disruptive of existing values and a drain on available resources.

Particularities of the university community as an employer

Canadian universities are major employers in this country. In 1981-82, they employed 33,244 men and women with academic rank.(1) While precise national data are not available on the numbers of non-academic personnel and part-time employees, it is possible to gauge the importance of this responsibility from the fact that Canadian universities expended $1.8 billion for salaries and wages to employees without academic rank in 1983-84.(2) In total, 81.3% of the general operating expenditures of universities were applied to salaries, wages and fringe benefits.(2)

This brief concentrates on employees with academic rank.

The academic staff in Canadian universities have a peculiar demographic profile. In 1963-64, the median age of faculty was 39.4 years. In 1981-82, 18 years later, it was a little over 43.(3) This age factor will vary from one discipline to another based upon the historical timing of society's demands upon the discipline. Overall, however, full-time faculty members in Canadian universities are aging. In 1981-82, 58.5% were between the ages of 35 and 49, 27.2% were above 50 years

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(1) Education in Canada, A statistical review for 1981-82 - Statistics Canada 81-229

(2) Financial Statistics of Universities and Colleges, 1983-84 - prepared by Statistics Canada

(3) Teachers in Universities - Statistics Canada 81-241

of age and 14.3% were 34 years of age or under. This compares with the situation 10 years earlier when 47% were between 35 and 49 years of age, 14.7% exceeded 49 years of age and 38.3% were under age 35.(4) In 1970-71, 17% of the teaching force were new appointments. By 1981-82, that proportion was reduced to 6.5%.(4) This latter data may be misleading considering the definition of "new appointments" used by Statistics Canada. Possibly more relevant is the fact that, in 1981-82, 11% of new appointments indicated that they had been students the previous year, a decline from 22% in 1972-73. This aging process can be expected to increase unless new and innovative measures are taken.

The impact of the aging professoriate was specifically considered by the Commission on the Future Development of the Universities of Ontario. Their report states the following:

> "During the course of our hearings we heard a considerable body of evidence pointing to the very impressive benefits which would accrue to the system if the opportunity to appoint younger faculty were restored to a more normal level. The abnormal faculty age distribution which has resulted from the dramatic increase in staffing in the 1960's and early 1970's has meant that with currently relatively few retirements, there are few openings for the present generation of young scholars and teachers. The presence of an appreciable number of talented new faculty would enhance instructional quality and adaptability and also assist in building

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(4) The Changing Profile of Full-Time Faculty at canadian Universities - Max von Zür-Muehlen, February 11, 1983

> up desired centres of strength in key developing fields of research and instruction. We would be replenishing our stock of productive human capital. To the degree that a more normal number of new appointments occurs, improvement in the proportion of women faculty would be possible. Moreover, the additional appointments would greatly aid in enlarging the capacity of the system to cope with the enrolment pressures to be faced at the end of the decade from the impact of the "double cohort." Finally, these younger faculty, if put into the pipeline now, would be available to replace older faculty in the earlier half of the next decade, as the rate of retirement of such faculty begins to accelerate. Such "bridging" to the 1990's is a most desirable component of sound long range planning."(5)

The Commission concluded that, in Ontario, removal of mandatory retirement would, by 1989, result in approximately 300 fewer new faculty having been recruited than would otherwise have been the case and an increase in operating costs due to the retention of higher salaried faculty rather than their replacement with younger faculty. The Commission estimated that a further $24 million would be required to help defray these additional costs.(6)

Universities are not only involved in communicating knowledge, they are involved in the discovery and development of that knowledge. If Canada is to maintain and increase its status

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(5) Ontario Universities: Options and Futures - the Commission on the Future Development of the Universities of Ontario (Bovey Commission) December 1984, page 21.

(6) Bovey Commission, page 22

among developed countries, it is imperative that its universities continue to be innovators and not merely users of new knowledge developed abroad. This is true in all areas of knowledge, but it is particularly important if Canada is to develop high technology and study how society can adapt to the knowledge revolution. The ability to recruit young and well-prepared academics is, therefore, crucial to the important role our universities must play in Canadian, and indeed, international society. Recruitment can only occur if existing positions become vacant or substantial additional funding is made available to create new opportunities.

Unless our universities are able to recruit promising young scholars now to replenish their academic resources, Canada will be deficient when the incumbents of academic appointments leave those positions by virtue of their own unilateral retirement decisions or death. Even if there were to be a sufficient pool of qualified applicants at that time to fill those appointments as they become vacant, the age, experience and productivity pattern of Canada's academic resources could well be skewed towards inexperienced individuals. The potential elimination of mandatory retirement will aggravate the situation unless resources are provided to assume the costs of an older and more expensive professoriate or to underwrite the costs of programs that will encourage retirement.

Academic employment and its salary structure are very different from the traditional pattern. A hierarchy of positions with salary limitations by classification and promotion only when a superior position becomes vacant is unsuitable to the academic career. Each university teacher is an individual who is assessed on the basis of quality of performance and not in terms of job-related responsibilities.

The responsibilities of academics are associated with quality output and cannot be related to an internal staffing structure. Furthermore, it is a professional employment situation where, often, the competing market for recruitment is the private professional practice where excellence, reputation and output are, subject to market differential rates for fees, the sole limitations on income. As an academic career develops, the individual becomes entitled to additional salary increments, providing that performance is consistent with reasonable expectations, and these increments are built into the individual salary base. These increments are usually known as progress increments or career development increments and are essential to retention of productive academics. As the age and experience of the professoriate increase, however, so do the salary costs to the institution unless these can be off-set by the attrition of senior academics and their replacement at junior ranks.

Peculiar to academic employment is the difficulty of accurate assessment of performance. The performance expectation is quality in the development of knowledge and only peers are capable of assessing whether or not new theories, knowledge and ideas are academically sound. Knowledge is not developed on the basis of right or wrong but on the basis of sound theories that subsequent experimentation will prove or disprove.

One must point out that tenure in Canadian universities is not, in itself, a hindrance to the proper and effective management of academic staff. While it allows some security and safeguards, it does not protect from incompetence, inability to perform or misconduct. Tenure does not prevent dismissal for cause. Assessment of performance, when that performance requires the challenge of existing beliefs, is the issue.

History is replete with examples of people who were misunderstood and wronged by their contemporaries only to become the fount of knowledge for future generations. Research, with no conceivable immediate application, has usually formed the basis of the body of knowledge from which innovations are finally distilled and upon which future generations assure their well-being.

Academic employment is different from the traditional concepts of employment but it is not unique. The judiciary, for example, offers many parallels. Members of the judiciary benefit from tenure to ensure their independent judgement and to protect them from reaction to unpopular decisions. Academics also require independence to challenge existing knowledge and beliefs. The judiciary is subject to dismissal for misconduct, incapacity or disability and so too are academics. The performance of a judge cannot be quantified in terms of the number of decisions rendered over time or the number of times judgements are reversed or varied on appeal. The performance of an academic cannot be quantified in terms of volume of publications or the number of times research conclusions are proven wrong for to be proven wrong in itself advances knowledge.

Potential effect of the removal of mandatory retirement

For the purposes of this brief, it is assumed that mandatory retirement will not survive the coming into force of the Equality Rights Section of the Charter. It is recognized that opinions on this assumption are divided and we are not prepared to adopt or favour one opinion over another. Future legal developments will provide our society with an answer. We merely note that, if mandatory retirement has been abolished by

the Equality Rights Section of the Charter, that action has a substantial and severe impact upon Canadian universities.

The Discussion Paper entitled "Equality Issues in Federal Law", from page 14 onwards, sets out a number of arguments made both in favour and against mandatory retirement. The text qualifies the concerns as being "social and economic". We prefer to consider them in terms of economic, human and social repercussions.

There is very little experience upon which one can rely to determine the retirement patterns of academics in the absence of mandatory retirement. The province of Manitoba has lived without mandatory retirement since 1980 and the province of Quebec has raised mandatory retirement age to 70 by legislation. Data available from The University of Manitoba indicates that one half of academic staff retire on or before reaching the age of 65, 16.5% will retire within two years of reaching normal retirement age and 32.6% defer retirement indefinitely.

Economic impact

The disappearance of mandatory retirement from the employment context of our universities implies the retention of an academic staff at the higher levels of existing salary scales. This problem has already been identified in the Report of the Commission on the Future Development of the Universities of Ontario. It is not limited to the universities of that province; an identical situation exists generally in Canadian universities.

For some time now Canadian universities have inquired into and experimented with mechanisms designed to create openings for younger scholars via incentives such as early retirement programs. These programs are already limited by available financial resources and any increase in their costs will create further limitations.

Universities, unlike most businesses or other public institutions in Canada, have little control over their revenues and very limited revenue-raising capabilities. The commercial enterprise has the flexibility to seek a greater share of its market, to make its operations more efficient or to increase its productivity. Public bodies such as governments and school boards have taxing powers from which revenue is raised. Universities are limited to public grants and tuition fees and, in some provincial jurisdictions, the tuition fees themselves are subject to government-dictated limitations. Furthermore, in some provinces universities are prohibited by law from accumulating a deficit or carrying a deficit beyond a pre-determined level. The costs of staffing plans or incentives such as early retirement schemes must be covered out of available operating revenues at the expense of much-needed expenditures to maintain and enhance academic quality.

Human impact

The repercussions on human beings of the removal of mandatory retirement are not negligible. They will affect those whose dignity and human values we seek to enhance (the employees), those who benefit from the services of the employees (the students) and those seeking entrance to the employee group (aspiring scholars).

The community of academics will be negatively affected in human terms in at least two ways. If cause becomes the only reason for termination of employment, except on the willing initiative of the employee, universities will have to develop quantitative performance assessment mechanisms so as to closely monitor whether cause exists or not. This attempt to monitor performance, which can only be assessed in quantitative terms over long periods of time, will require employers to terminate careers as soon as cause appears, otherwise it may later be said that the faulty performance was condoned and is no longer available to the employer as cause. Academic appointments are subject to judicial supervision and failure to demonstrate adequate cause for termination invariably results in reinstatement with recovery of lost income and benefits. Unjustified termination of an academic appointment, in the sense of an unproven reasonable cause for termination or a procedural default in arriving at the decision, does not result in a monetary judgement for a period of reasonable notice as is the case for the industrial or commercial setting.

Furthermore, it can be expected that many academic careers, even successful ones, must terminate in the destruction of the individual's honour and integrity. With mandatory retirement, both the individual and the institution can, with all dignity, terminate an academic career and, in many cases, post-retirement honours such as the title of "professor emeritus" can be bestowed upon an individual whose career was outstanding but may no longer be as productive as may be expected. In the absence of mandatory retirement, careers of all academics, except those who opt for retirement benefits as an economic base for a career or lifestyle re-orientation, must terminate with the individual's realization that he or she is no longer sufficiently productive. In the absence of that personal conclusion, that message must be brought home to the individual through actual or threatened dismissal proceedings.

The disappearance of mandatory retirement also has a negative human impact on the students of the institution. Universities know through experience that disciplinary action, including dismissal, has a very unsettling effect on the learning environment where the action is taken or threatened. In universities, disciplinary actions are particularly long and protracted especially where academic performance is an issue. Considering that students attend universities for limited periods in their lives, the loss to the learning environment is not recoverable.

Finally, while we cannot speak of this in precise terms, the removal of mandatory retirement will certainly limit the availability of potential openings for highly trained aspiring scholars. These potential scholars will be denied opportunities enjoyed by those that preceded them through the sheer accident of their birth dates. This phenomenon is occurring already and the elimination of mandatory retirement will aggravate this factor.

Social impacts

There are also social impacts to consider. Those affecting the retired employee or employees approaching retirement age are known and have been argued. The difficulties created by the retention of academics whose knowledge may no longer be at the forefront of their disciplines but whose ability and/or conduct do not call for dismissal, and the loss of new ideas and new knowledge that could have been created by young aspirants who are denied access to academic careers are incalculable but should not be excluded from the equation. Because the effects cannot be quantified, it must nevertheless be retained as a serious consideration.

Conclusion

If developments conclude that the coming into force of equality rights has removed mandatory retirement from the workplace, we can foresee serious loss to universities, to the community and to the society they serve.

We appreciate this opportunity to underline to those in government responsible for the planning of our society in the present and the future that the advent of equality rights raises the need to plan available resources so that economic, human and social values are also protected.

In summary

In summary, the AUCC is concerned that,

- in the absence of mandatory retirement the lack of career opportunities for young and promising scholars will be further aggravated;

- already limited financial resources for our universities will be further drained either by the retention of a more expensive professoriate or by the costs of alternatives to mandatory retirement;

- in the absence of mandatory retirement policies, the human practices of institutional loyalty that allow termination of employment through retirement of once productive scholars may well be replaced by the disciplinary actions for termination for cause;

- the loss to the body of knowledge resulting from the lack of career opportunities for young and promising scholars may outweigh the benefits of the removal of mandatory retirement.

EXECUTIVE SUMMARY

The brief of the Association of Universities and Colleges of Canada (AUCC) addresses only the issue of mandatory retirement. It assumes that Section 15 of the Charter of Rights and Freedoms will prohibit the present practice of retiring employees by reason of the age of the employee.

Canadian universities not only prepare highly skilled human resources for the economy of Canada. In addition, they are themselves large employers, devoting approximately 81.3% of their general operating expenditures to salaries, wages and benefits. These institutions already face the problems associated with an aging professoriate and the almost non-existence of career opportunities for young and promising scholars. The situation will be further aggravated if mandatory retirement is no longer possible.

The conditions of academic employment are different from the traditional employment situation where salaries are assessed by reference to employment categories and promotion is dependent upon a vacancy in a higher category. Academics are promoted on the basis of quality and all can reach the higher and, in terms of salaries, more expensive categories of their profession. In the absence of mandatory retirement it is anticipated that salary costs will further deplete the limited financial resources that are available to these institutions.

Furthermore, the nature of performance in an academic setting is qualitative, making it very difficult to prove cause if that is required for termination. In the absence of mandatory retirement, it can also be expected that decisions to terminate careers will have to be taken as soon as evidence of cause is deemed sufficient to avoid a later claim that the lack of performance or conduct has been condoned.

The absence of career opportunities for young and promising scholars may result in the loss to society of new knowledge that could have been produced had they been able to pursue an academic career.